IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

OBED NORMAN, Appellant, v. STATE OF WASHINGTON and WASHINGTON STATE UNIVERSITY, Respondents.	No. 33719-3-II UNPUBLISHED OPINION

Quinn-Brintnall, C.J. — On February 18, 2000, Washington State University (WSU) denied Dr. Obed Norman tenure. The superior court dismissed this, his third lawsuit related to that decision, for Norman's failure to properly serve WSU, the State of Washington, and the 44 named defendants. We affirm.

Facts

Norman was an assistant professor in the School of Education at WSU until August 15, 2001. After being denied tenure, he filed an Equal Employment Opportunity Commission (EEOC) charge against WSU, alleging that WSU's actions in denying him tenure and promotion were racially discriminatory. Norman then sued WSU in federal district court, alleging racial discrimination and retaliation. WSU ultimately prevailed following a jury trial and an appeal to the Ninth Circuit Court of Appeals.

Shortly after the jury's verdict and during the pendency of his appeal, Norman filed a second EEOC charge against WSU. After the EEOC issued a right-to-sue letter, Norman filed a second complaint in federal district court. This complaint named WSU, the State of Washington, and 44 individual defendants. It alleged racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964. In an amended complaint, he added 14 state law claims. On August 19, 2003, the federal district court dismissed the Title VII claims and declined to exercise supplemental jurisdiction over the state law claims. The Ninth Circuit affirmed on January 6, 2005.

On February 1, 2005, Norman filed a document in the Clark County Superior Court entitled, "Federal Case No. CO2-5494 FDB Being Removed to the Superior Court for Clark County, Vancouver, Wa." 1 Clerk's Papers (CP) at 129. This document alleged the 14 state law claims that the federal court had declined jurisdiction to consider. It alleged a new state law claim under chapter 49.60 RCW, and it alleged the same federal Title VII claims that the federal court had dismissed.[1]

On February 18, 2005, an administrative assistant in the Attorney General's office received a copy of this document. It was not accompanied by a summons or properly served. On February 24, 2005, the assistant attorney general (AAG) that represented the defendants in the federal causes of action received a document entitled, "Federal Case No. CO2-5494 FDB Removed to the Superior Court for Clark County, Vancouver, Wa Motion for Stay of Requirements to Serve CoDefendants." 1 CP 180. Norman noted the motion for March 4, 2005, and asked that he not be required to serve the 44 individual defendants because he had served

[1] Norman filed a tort law claim with the State on June 16, 2005.

them in the federal case. On March 2, 2005, WSU served and filed a document entitled, "Notice of Appearance for Purposes of Dismissal Only." 1 CP at 188. On March 4, 2005, the superior court dismissed Norman's motion as neither party appeared. On April 15, 2005, Norman refiled his motion to stay the service requirements, noting it for June 3, 2005. On May 19, 2005, WSU filed a document entitled, "Defendants' Opposition to Motion for Stay of Requirements to Serve Co-Defendants and Request for Dismissal for Lack of Jurisdiction." 1 CP at 200.

On May 31, 2005, Norman served his complaint with a summons on an AAG.

On June 1, 2005, Norman moved to strike WSU's motion to dismiss as untimely under CR 56. On June 10, 2005, the superior court preliminarily granted WSU's motion to dismiss for lack of jurisdiction:

> It is the conclusion of the Court that no summons was filed in the initial filing of the Complaint, and that what was initially served to the extent service was made on February 18th does not constitute the service of a summons and complaint sufficient to meet with the statutory and court rule requirements.
>
> The second question before the Court, the plaintiff asks leave for the Court to consider any defect cured by the filing of a subsequent summons. As noted, such a summons has not yet been filed with the clerk. But even if it should be filed at a later date and be in compliance with the requirements of Civil Rule 4, it has not been timely served with the ninety-day time period that is required by statute.

2 Report of Proceedings (RP) at 35. But on June 17, 2005, the superior court decided that the motion should be considered under CR 56. It then allowed the parties to file additional briefing. On July 8, 2005, the superior court issued a written order of dismissal. The court dismissed Norman's claim that WSU had waived its claim of insufficient service:

> In this case, we do not have a delay in time such as is present in the [*Lybbert*] case and the parties have not engaged in any discovery. The defendant has not engaged in discovery or the record does not disclose any discovery or contacts by the State as to any substantive issues.
>
> The essence of the doctrine of waiver is that the defendant has to have engaged in some conduct which has caused the waiver to occur and that would

> make the assertion of the defense of insufficient service of process within the statute of limitations to be inconsistent with the defendant's previous behavior.
>
> I find that such acts have not occurred in this case. The defendant immediately raised the issue of insufficient service of process in their notice of appearance.

4 RP at 60-61. Norman appeals.

ANALYSIS

Because Norman never obtained personal jurisdiction over the defendants, we affirm. A superior court does not have jurisdiction over the state or any other defendants until the plaintiff satisfies the service requirements in RCW 4.92.020, 4.28.080, and CR 4. *Painter v. Olney,* 37 Wn. App. 424, 427, 680 P.2d 1066, *review denied*, 102 Wn.2d 1002 (1984); *In re Marriage of Logg,* 74 Wn. App. 781, 784, 875 P.2d 647 (1994); *Landreville v. Shoreline Comty. Coll. Dist. No. 7*, 53 Wn. App. 330, 766 P.2d 1107 (1988) (leaving summons and complaint with administrative assistant in Attorney General's office is insufficient).

RCW 4.92.020 provides:

> Service of summons and complaint in such actions shall be served in the manner prescribed by law upon the attorney general, or by leaving the summons and complaint in the office of the attorney general with an assistant attorney general.

RCW 4.28.080 requires:

> Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:
>
> . . . .
>
> (15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

CR 4 requires, in part:

> **(a) Summons–Issuance**.
>
> (1) The summons must be signed and dated by the plaintiff or his attorney, and directed to the defendant requiring him to defend the action and to serve a copy of his appearance or defense on the person whose name is signed on the summons.
>
> . . . .
>
> **(b) Summons**.
>
> (1) *Contents*. The summons for personal service shall contain:
>
> (i) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;
>
> (ii) A direction to the defendant summoning him to serve a copy of his defense within a time stated in the summons;
>
> (iii) A notice that, in case of failure so to do, judgment will be rendered against him by default. It shall be signed and dated by the plaintiff, or his attorney, with the addition of his post office address, at which the papers in the action may be served on him by mail.
>
> . . . .
>
> **(d) Service**.
>
> (1) *Of Summons and Complaint*. The summons and complaint shall be served together.
>
> (2) *Personal in State*. Personal service of summons and other process shall be as provided in RCW 4.28.080-.090, 23B.05.040, 23B.15.100, 46.64.040, and 48.05.200 and .210, and other statutes which provide for personal service.
>
> . . . .
>
> (5) *Appearance*. A voluntary appearance of a defendant does not preclude his right to challenge lack of jurisdiction over his person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b).

The record before this court shows that Norman (1) did not properly served the Attorney General until May 31, 2005; and (2) never served any of the individual defendants. On this basis alone, the superior court properly dismissed this case.

In his motion to stay the service requirements, Norman averred that

> all defendants and codefendants, including the Attorney General, had been process served at the time this case was originally served in the Federal District Court in Tacoma, WA in January 2003. At that time the AG filed an appearance as counsel representing all the defendants and co-defendants in the case.

1 CP at 180. WSU asserts that Norman did not serve the defendants with a summons and

complaint in the second federal case. But we need not address that argument because Norman cites no authority that proper service in a federal case satisfies process and service requirements under state law. 28 U.S.C. § 1367(c) allows the federal district court discretion to exercise supplemental jurisdiction of state law claims. If the district court declines the exercise discretion, the time for asserting the claim in state court is tolled for 30 days unless state law allows a longer tolling period. 28 U.S.C. § 1367(d). But nothing purports to eliminate the state law service and process requirements.

Norman asserts, however, that the State waived its claim of insufficient service by not asserting it in a pleading as CR 12(b) and CR 7(a) require. *Lybbert v. Grant County*, 141 Wn.2d 29, 43, 1 P.3d 1124 (2000) (affirmative defense must be asserted in a pleading, not in notice of appearance).

But the issue in *Lybbert* was whether Grant County had waived its claim of insufficient service by engaging in protracted discovery and not asserting the defense until after the statute of limitations had expired. Grant County only asserted the defense in its initial notice of appearance and did not do so again until the plaintiffs could not remedy the service defects.

Here, WSU asserted it first in its limited notice of appearance and then in opposition to Norman's motion to waive the service requirements. Further, WSU's notice of limited appearance clearly apprised Norman that he had not satisfied statutory requirements:

> In making this limited appearance, the State of Washington, Washington State University, and the individuals originally named in federal cause of action #C02-5494 FDB *do not* acknowledge that plaintiff Pro Se Obed Norman has served any of the named defendants with a summons and complaint in accordance with RCW 4.92.020, CR 4(d)(1), and other relevant statutory provisions.

1 CP at 188-90. That his service was inadequate was clearly evident to Norman else he need not

have filed a motion to waive the service requirements. The superior court properly concluded that neither estoppel nor waiver precluded WSU's assertion that Norman failed to properly serve them and that the court thereby never obtained personal jurisdiction over the defendants.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

ARMSTRONG, J.

PENOYAR, J.